PRIMUS (MALAYSIA) SDN BHD A

v.

RIN KEI MEI & ORS

FEDERAL COURT, PUTRAJAYA B
ARIFIN ZAKARIA CJ (MALAYA)
HASHIM YUSOFF FCJ
MOHD GHAZALI YUSOFF FCJ
[APPLICATION NO: 08(i)-289-2011(W)]
17 NOVEMBER 2011 C

COMPANY LAW: *Members' rights - Petition under s. 181 Companies Act 1965 - Oppression - Appeal against - Company divesting assets and liabilities - Distribution of proceeds from disposal to shareholders - Whether members unfairly discriminated or prejudiced - Whether cancellation of members shares totally sever, end and settle mutual relations between company and members - Whether company breached the memorandum and articles of association - Scheme of arrangement - Meaning of - Whether company undergoing corporate restructuring exercise - Companies Act 1965, s. 176* D E

COMPANY LAW: *Oppression - Relief - Petition under s. 181 Companies Act 1965 - Appeal against - Company divesting assets and liabilities - Distribution of proceeds from disposal to shareholders - Whether members unfairly discriminated or prejudiced - Whether cancellation of members shares totally sever, end and settle mutual relations between company and members - Whether company breached the memorandum and articles of association - Scheme of arrangement - Meaning of - Whether company undergoing corporate restructuring exercise - Companies Act 1965, s. 176* F G

COMPANY LAW: *Shares - Capital reduction - Petition under s. 181 Companies Act 1965 - Company divesting assets and liabilities - Whether illegal for company to reduce capital after disposal of business - Whether monies from disposal distributed to its shareholders - Companies Act 1965, s. 64* H

COMPANY LAW: *Memorandum of association - Compliance with memorandum and articles of association - Effect of - Whether company breached memorandum and articles of association - Companies Act 1965, s. 33* I

CIVIL PROCEDURE: *Appeal - Leave to appeal - Application for leave to Federal Court against Court of Appeal's decision - Whether questions posed raised any matter of public importance - Whether questions for leave merely relates to interpretation of ss. 33, 64 and 176 Companies Act 1965 - Whether requirements for leave to appeal met - Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd - Courts of Judicature Act 1964, s. 96*

This was the applicant's application for leave to appeal to this court which arose from the dismissal of its petition premised on s. 181 of the Companies Act 1965 ('the Act') in the High Court and subsequently, the dismissal of its appeal in the Court of Appeal. The applicant was a registered shareholder of the 13th respondent, *ie*, EON Capital Berhad ('EON') which at the material time was listed on Bursa Malaysia. EON's principal asset was its 100% equity ownership of EON Bank Berhad ('EBB'). EON had commenced negotiations with Hong Leong Bank Berhad ('HLB') for the potential divestment of assets and liabilities of EON and EBB, including EON's interest in EBB for the purpose of merging the licensed entities under EON's group with the HLB group. During EON's extraordinary general meeting, certain resolutions were passed, *inter alia*, (i) disposal of the entire assets and liabilities of the company to HLB and (ii) distribution of cash proceeds arising from the disposal to all entitled shareholders of the company. It was also EON's intention to initiate a voluntary winding-up thereafter. The main substratum of the applicant's petition anchored upon the said business transaction, namely the sale of all the assets and liabilities of EON to HLB for cash and in consequence, a distribution of the monies to its shareholders. Thus, the applicant applied to set aside the said transaction by presenting the petition under s. 181 of the Act. The High Court dismissed the petition with costs on the grounds that there was nothing illegal about the transaction and neither did the resolutions breach any statute or the company's powers. The applicant's appeal to the Court of Appeal was dismissed wherein the High Court's decision was affirmed. Hence this appeal by the applicant. The questions for leave to appeal posed by the applicant to this court were, *inter alia*, (a) whether a proposal to sell or realise all the assets and liabilities of a company by cancelling every share held by its existing members, amounts to a proposal to totally sever, end and settle the mutual relations between the company and all its existing members under s. 33(1) of the Act and whether

such proposal is within the meaning of an 'arrangement' in s. 176 of the Act; (b) whether s. 64 of the Act is one of the statutory ways of enabling or empowering a company to sever, end and settle its mutual relations with its entire body of its existing members, and (c) whether it is repugnant to the scheme of the Act for a company to issue shares for the purpose of winding-up itself voluntarily.

Held (dismissing the application with costs)
Per Mohd Ghazali Yusoff FCJ delivering the judgment of the court:

(1) There was nothing wrong or illegal for a company to undergo a capital reduction exercise under s. 64 of the Act after disposing of its entire business for cash and consequently distributing the monies to its shareholders. (para 37)

(2) The applicant had not shown that the "comprehensive proposal" unfairly discriminated against or was otherwise prejudicial to it as a member. Having failed to do so, the applicant could not have contended that it had brought itself within the scope of s. 181(1)(b) of the Act. Besides, the mere use of voting power at a general meeting to secure the passing of resolutions would not in general constitute oppression for the purpose of s. 181(1)(a) of the Act or for any purpose under s. 181(1)(b) of the Act. (paras 38 & 52)

(3) The applicant ceased to be a member when its shares were extinguished after the distribution of monies and the reduction of share capital exercise. If EON subsequently undertakes a voluntary winding-up exercise, that would be of no relevance to these proceedings and would be of no concern to the applicant as mutual relations between them would have ended. (para 39)

(4) After the capital reduction exercise, the entitled shareholders including the applicant would no longer remain on the register of members kept by the company pursuant to s. 158 of the Act. As such, there was no contravention of s. 33 of the Act. (para 40)

(5) A scheme of arrangement falling within the contemplation of s. 176 of the Act is basically a scheme under which the rights of creditors and/or members are varied for the benefit

of both the company and its creditors/members. Through such schemes, the company may be able to reach a compromise with creditors where the creditors agree to accept less than the amounts owed to them. Further, s. 176 of the Act allows a corporate restructuring to proceed under the court's supervision where the decisions of the majority creditors are binding on the minority creditors. (paras 43 & 44)

(5a) The circumstances surrounding the transaction did not illustrate or suggest that creditors had knocked on EON's doors which may necessitate EON to undergo a corporate restructuring exercise. It was for EON to decide the appropriate method to effect the sale of the assets and distribution of the proceeds to its shareholders. There was no provision in the Act which made it mandatory for such transaction to be completed under s. 176 of the Act. (paras 45 & 51)

(6) In carrying out the transaction as a whole, EON had religiously adhered to the memorandum and articles of association of the company and the provisions of the Act most appropriate to the transaction and obtained the necessary court orders as required. Besides, the transaction was not prohibited by law and had since been completed. Thus, the matter is now academic. (paras 50 & 51)

(7) It was not shown that the respondents had breached any provision under the Act or under the memorandum and articles of association of the company. The questions posed by the applicant did not raise any matter of public importance. They were merely questions relating to the interpretation of ss. 33, 64 and 176 of the Act and as such, failed to meet the requirements for leave to appeal (Courts of Judicature Act 1964, s. 96) (*Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications*; refd). (paras 32, 49 & 54)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan perayu bagi kebenaran merayu ke mahkamah ini yang telah berbangkit daripada penolakan petisyennya yang berpremis atas s. 181 Akta Syarikat 1965 ('Akta') di Mahkamah Tinggi dan seterusnya, penolakan rayuannya

di Mahkamah Rayuan. Pemohon adalah pemegang saham berdaftar responden ke-13, iaitu, EON Capital Berhad ('EON') di mana pada masa material, telah disenaraikan dalam Bursa Malaysia. Aset utama EON merupakan pemilikan 100% ekuitinya dalam EON Bank Berhad ('EBB'). EON telah memulakan rundingan dengan Hong Leong Bank Berhad ('HLB') bagi potensi penjualan aset dan liabiliti EON dan EBB, termasuk kepentingan EON dalam EBB bagi tujuan menggabungkan entiti berlesen di bawah kumpulan EON dengan kumpulan HLB. Pada mesyuarat agung luarbiasa EON, beberapa resolusi telah diluluskan, antara lain (i) pelupusan segala aset dan liabiliti syarikat kepada HLB dan (ii) pengagihan hasil kutipan tunai yang berbangkit daripada pelupusan tersebut kepada semua pemegang saham syarikat yang berlayak. Adalah juga niat EON untuk memulakan penggulungan secara sukarela selepas itu. Substratum utama petisyen pemohon adalah berdasarkan transaksi perniagaan tersebut, iaitu penjualan aset dan liabiliti EON kepada HLB dengan tunai dan sebagai akibatnya, pengagihan wang kepada pemegang-pemegang sahamnya. Oleh itu, pemohon memohon untuk mengenepikan transaksi tersebut dengan mengemukakan petisyen di bawah s. 181 Akta. Mahkamah Tinggi telah menolak petisyen tersebut dengan kos atas alasan bahawa tidak ada apa-apa yang menyalahi undang-undang berkenaan transaksi itu dan resolusi-resolusi tidak melanggar mana-mana statut atau kuasa syarikat. Rayuan pemohon kepada Mahkamah Rayuan telah ditolak di mana keputusan Mahkamah Tinggi disahkan. Oleh itu rayuan ini oleh pemohon. Soalan-soalan untuk kebenaran merayu yang ditujukan oleh pemohon kepada mahkamah ini adalah, antara lain (a) sama ada cadangan untuk menjual atau menghasilkan aset dan liabiliti syarikat dengan membatalkan setiap saham yang dipegang oleh ahli-ahlinya yang sedia ada, merupakan cadangan untuk memutuskan, menamatkan dan menyelesaikan hubungan bersama di antara syarikat dan semua ahli-ahli yang sedia ada di bawah s. 33(1) Akta dengan sepenuhnya dan sama ada cadangan itu dalam pengertian 'penyusunan' dalam s. 176 Akta; (b) sama ada s. 64 Akta adalah salah satu cara statutori bagi membolehkan atau memberi kuasa kepada sebuah syarikat untuk memutuskan, menamatkan dan menyelesaikan hubungan bersama dengan seluruh badan ahli-ahlinya yang sedia ada dan (c) sama ada ia adalah bertentangan terhadap skima Akta bagi sesuatu syarikat untuk mengeluarkan saham bagi maksud penggulungannya secara sukarela.

A B C D E F G H I

Diputuskan (menolak permohonan dengan kos)
Oleh Mohd Ghazali Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Tiada apa-apa yang tidak betul atau salah di sisi undang-undang bagi sesuatu syarikat untuk menjalani pengurangan kapital di bawah s. 64 Akta selepas melupuskan keseluruhan perniagaannya dengan tunai dan seterusnya mengedarkan wang kepada pemegang-pemegang sahamnya.

(2) Pemohon tidak menunjukkan bahawa "cadangan komprehensif" tersebut telah secara tidak adil mendiskriminasi atau berprejudis terhadapnya sebagai seorang ahli. Setelah gagal berbuat demikian, pemohon tidak boleh menegaskan bahawa ia telah membawa dirinya dalam skop s. 181(1)(b) Akta. Selain daripada itu, dengan menggunakan kuasa mengundi dalam mesyuarat agung untuk menjamin kelulusan resolusi tidak secara umumnya menjadi penindasan bagi kehendak s. 181(1)(a) Akta atau bagi sebarang kehendak di bawah s. 181(1)(b) Akta.

(3) Pemohon tidak lagi merupakan ahli apabila sahamnya telah dihapuskan selepas pengagihan wang dan pengurangan kapital saham. Jika EON seterusnya menjalankan penggulungan secara sukarela, ianya tidak relevan kepada prosiding ini dan bukanlah sesuatu untuk dibimbangkan oleh pemohon memandangkan hubungan bersama di antara mereka telah pun tamat.

(4) Selepas menjalankan pengurangan kapital, pemegang-pemegang saham yang layak termasuk pemohon tidak lagi akan kekal dalam daftar ahli-ahli yang disimpan oleh syarikat menurut s. 158 Akta. Oleh itu, tiada pelanggaran s. 33 Akta.

(5) Satu skima penyusunan yang jatuh di bawah pentakrifan s. 176 Akta tersebut adalah pada asasnya satu skima di mana hak-hak pemiutang-pemiutang dan/atau ahli-ahli diubah bagi manfaat kedua-dua syarikat dan pemiutang-pemiutang/ahli-ahlinya. Melalui skima tersebut, syarikat mungkin dapat mencapai kompromi dengan pemiutang-pemiutang di mana pemiutang-pemiutang bersetuju untuk menerima kurang daripada jumlah yang terhutang kepada mereka. Lagipun,

s. 176 Akta membolehkan penyusunan semula korporat untuk diteruskan di bawah pengawasan mahkamah di mana keputusan pemiutang-pemiutang majoriti mengikat pemiutang-pemiutang minoriti.

(5a) Keadaan mengelilingi transaksi di sini tidak memberi ilustrasi atau mencadangkan bahawa pemiutang-pemiutang telah mengetuk pintu EON yang mungkin memerlukan EON untuk menjalani penyusunan semula korporat. Ia adalah bagi EON untuk memutuskan kaedah yang berpatutan untuk melaksanakan penjualan aset-aset dan pengagihan hasil-hasil kepada pemegang-pemegang sahamnya. Tidak ada peruntukan dalam Akta yang menjadikannya mandatori bagi sesuatu transaksi sebegini diselesaikan di bawah s. 176 Akta.

(6) Dalam menjalankan transaksi secara keseluruhannya, EON telah mematuhi memorandum dan artikel pertubuhan syarikat dan peruntukan-peruntukan Akta yang berpatutan bagi transaksi itu dan telah memperolehi perintah-perintah mahkamah yang diperlukan seperti yang dikehendaki. Selain daripada itu, transaksi tersebut tidak dilarang oleh undang-undang dan telah diselesaikan. Justeru, perkara ini kini menjadi akademik.

(7) Ia tidak ditunjukkan bahawa responden-responden telah melanggar mana-mana peruntukan di bawah Akta atau di bawah memorandum dan artikel pertubuhan syarikat. Soalan-soalan yang dikemukakan oleh pemohon tidak menimbulkan apa-apa perkara bersifat kepentingan awam. Soalan-soalan tersebut cuma berkaitan dengan pentafsiran ss. 33, 64 dan 176 Akta dan oleh itu, telah gagal memenuhi keperluan bagi kebenaran untuk merayu (Mahkamah Kehakiman 1964, s. 96) (*Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications*; dirujuk).

Case(s) referred to:

Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***

In Re HR Harmer Ltd [1959] 1 WLR 62 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 33(1), 64(1)(b), 132C, 158, 176(1), 181(1)(b), 254(1), 270

Courts of Judicature Act 1964, s. 96(a)

For the applicant - Loh Siew Cheang (Kelvin Seet, Choo Jun Lin & Oon Wei Li with him); M/s Cheang & Ariff

For the 1st, 10th & 11th respondents - S Suhendran (SY Soh with him); M/s Kadir Andri & Partners

For the 2nd & 12th respondents - Gopal Sreenevasan (Conrad Young with him); M/s Sreenevasan Young

For the 3rd-9th respondents - Cecil Abraham (CS Nantha Balan, Sunil Abraham & Farah Shuhadah Razali with him); M/s Zul Rafique & Partners

For the 13th respondent - S Ramesh (Gary Yap with him); M/s Adnan Sundra & Low

[Appeal from Court of Appeal; Civil Appeal No: W-02-(NCC)-1131-11]

Reported by Kumitha Abdul Majid

JUDGMENT

Mohd Ghazali Yusoff FCJ:

[1] This is an application for leave to appeal to this court by the applicant (the petitioner in the originating action) arising from the dismissal of its petition premised on s. 181 of the Companies Act 1965 (the Act) in the High Court and the dismissal of its appeal in the Court of Appeal.

[2] The applicant posed the following questions in its application and which counsel for the applicant canvassed fall within the contemplation of s. 96(a) of the Courts of Judicature Act 1964, namely:

> (i) whether a proposal to sell or realise all the assets and liabilities of a company (not in liquidation) that involves an extinguishment of the entire body of existing members of the company by cancelling every share held by its existing members, amounts to a proposal to totally sever, end and settle the mutual relations between the company and all its existing members under s. 33(1) of the Act and such proposal is within the meaning of an 'arrangement' in s. 176 of the Act?;

(ii) whether, under the statutory framework or legislative scheme of the Act, s. 64 is one of the appointed statutory ways enabling or empowering a company to sever, end and settle its mutual relations with its entire body of existing members;

(iii) whether the words 'in any way' under s. 64 of the Act confers statutory authority upon a company to reduce capital to permanently nil by cancelling all existing shares of the company and thereby expelling the entire body of existing members;

(iv) whether s. 64 of the Act may be relied upon independently, or on a standalone basis, by a company to sever, end and settle mutual relations between itself and its entire body of existing members;

(v) whether it is repugnant to the scheme of the Act for a company to issue shares for the purpose of winding-up itself voluntarily; and

(vi) whether voluntary winding up of a company under Part X Division 3 of the Act is a statutory affair strictly between a company and its existing members to sever, end and settle their mutual relations, and cannot in law constitute the lawful object or consideration of an agreement between the company and third parties to wind up the company voluntarily.

The Background

[3] The applicant, a locally incorporated company, at the material time, was a registered shareholder of the 13th respondent, a locally incorporated company named EON Capital Berhad ("EON") which at the material time was listed on the local bourse, *viz*, Bursa Malaysia. EON's principal asset, at the material time, was its 100% equity ownership of EON Bank Berhad ("EBB"). EON had an authorised capital of RM2 billion and a paid-up capital base of RM693,209,000 divided into 693,209,000 shares.

[4] On 20 January 2010, in a general announcement to Bursa Malaysia, EON announced that Bank Negara Malaysia by way of letter dated 19 January 2010 indicated that it has no objection to EON commencing negotiations with Hong Leong Bank Berhad ("HLB") for the potential divestment of assets and liabilities of EON and EBB, including EON's interest in EBB for the purpose of merging the licensed entities under EON's group with the HLB group.

[5] Following negotiations, HLB, *vide* letter dated 1 April 2010 to EON, revised its earlier offer price of RM4,921,781,997.20 to RM5,060,423,743.60 (hereafter referred to as "the revised 2nd offer").

[6] Sometime after 15 June 2010, the applicant procured the transfer of a single share in EON which was subsequently registered in its name on 18 June 2010. On 21 June 2010 the applicant presented a petition under s. 181 of the Act in the High Court at Kuala Lumpur praying for several declarations and reliefs.

[7] On 1 September 2010, EON's board of directors resolved that an extraordinary general meeting ("EGM") be convened to be held on 27 September 2010 for the shareholders to consider the revised 2nd offer. Consequently, by way of circular to its shareholders EON gave notice of the coming EGM in relation to, *inter alia*, the following four resolutions:

(a) the proposed disposal of the entire assets and liabilities of the company to HLB for a cash consideration of RM5,060,423,743.60 ('Ordinary Resolution 1') and a proposed special dividend ('Ordinary Resolution 2');

(b) a special resolution ('Special Resolution 1') for the proposed increase in the company's authorised capital which reads as follows:

> THAT subject to passing of the Ordinary Resolution 1 above and Special Resolution 2 below and final decision from the High Court of Malaya on the petition filed by Primus (Malaysia) Sdn Bhd dated 21 June 2010 which was served on, amongst others, EON Capital Berhad (as nominal respondent), approval be and is hereby given to the Board of Directors of the Company to increase the authorized share capital of the Company from RM2,000,000,000 comprising 2,000,000,000 ordinary shares of RM1.00 each to RM6,000,000,000 comprising 6,000,000,000 ordinary shares of RM1.00 each by the creation of an additional 4,000,000,000 new ordinary shares of RM1.00 each, which rank *pari passu* with the existing ordinary shares of RM1.00 each in the Company and that the Memorandum of Association of the Company be amended accordingly ("Proposed Increase in Authorised Capital");

(c) the proposed distribution of the cash proceeds arising from the proposed disposal to all entitled shareholders of the company *via* the proposed special dividend and proposed capital repayment, and the proposed issuance of two ordinary shares of RM1 each in the company at par ('Special Resolution 2').

[8] Paragraph 3.1 of the said circular reads, *inter alia*, as follows:

> Upon the completion of the Proposed Capital Repayment, the Company will no longer have any shareholders, save for the two (2) individuals as referred to in paragraph (d) above, nor any assets other than potential net recoveries as stated in the paragraph below. It is the intention of the Board (with the exception of Mr Ng Wing Fai who dissented) not to maintain the listing status of the Company and barring any opportunity/proposal that might result in additional return to the shareholders, which will be dealt with in the manner described in the paragraph below, it is also the intention of the Company to initiate a voluntary winding-up of the Company thereafter.
>
> Please note that the winding-up of the Company is not the subject matter of this Circular and the resolution for the winding-up of the Company will only be tabled for decision by the then shareholders of the Company (who will then be two individuals referred to in the above paragraph (d) above) after the completion of the Proposals and at that time, the shareholders of the Company will be the two individuals to be identified by the Company at a later date.

[9] The four resolutions discussed above were passed at the EGM of EON held on 27 September 2010.

[10] The trial relating to the petition in the High Court was concluded on 9 February 2011 and on 28 April 2011 the learned judicial commissioner dismissed the petition with costs. The applicant appealed and the 3rd to the 9th respondents filed a cross-appeal on the issue of *locus*. On 26 June 2011 the Court of Appeal dismissed the applicant's appeal with costs and also dismissed the cross-appeal.

The Petition

[11] The complaints raised in the petition as summarised by the judicial commissioner in his grounds of judgment read as follows:

> The controversies that have surfaced for determination in this Petition evolved from a bid by Hong Leong Bank Berhad (HLB) to implement a take-over of the Company using the 'acquisition

of assets and liabilities' route. The Petitioner alleged that the decision of the Board of Directors (BOD) of the Company to table the offer from HLB for the approval of the shareholders was rushed through at the behest of certain shareholders of the Company and further questioned the legality surrounding the four(4) resolutions which had been formulated to effect the disposal of the Company's assets and subsequent distribution of the proceeds received, with an eventual winding-up of the Company to follow.

The Petitioner also alleged that the members of the BOD at the material time (save for one), had capitulated themselves to the pressure of certain shareholders who had decided to divest their shares in the Company. In so acting, it was contended that the delinquent members of the BOD had breached their fiduciary obligations and duties by subordinating the Company's best interest to, so-called, 'sectional interests'. It was further claimed that the certain shareholders who wished to exit the Company were also in breach of their mutual obligations, though not fiduciary, to fellow shareholders.

[12] In his grounds of judgment the judicial commissioner identified the issues to be as follows:

(a) the *locus standi* of the applicant to prosecute the petition;

(b) the issues relating to the legality of the four resolutions, *viz*, for disposal of assets and distribution of the proceeds formulated by the board of directors and placed before the shareholders for approval; and

(c) the allegations of breach of statutory obligations and fiduciary duties by members of the board of directors in "pushing through" the revised 2nd offer and/or revised offer and/or the four resolutions for shareholders' approval including the allegation that certain shareholders had disregarded or breached their obligation qua shareholder to the detriment of the interest of other shareholders.

First Issue

[13] With regards to this issue, the judicial commissioner ruled that the applicant has sufficient *locus* to prosecute the petition under s. 181 of the Act. Section 181(1) of the Act reads:

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

In relation to this ruling on *locus*, the judicial commissioner said:

> Even if limb (a) is to be given a restrictive reading, that is to encompass only alleged wrongful acts occurring during the tenure of one's membership in the Company (as contented for by some of the Respondents), I would however hold that limb (b) is sufficiently wide to allow the Petitioner to ventilate his grievances, particularly with reference to the impending Resolutions placed before the shareholders by the current BOD, for approval.
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> To that extent, I agree that it is a 'continuing story' and the Petitioner is not precluded from referring to prior conduct of affairs of the Company before the registration of the one share into the Petitioner's name.

[14] This issue of *locus* seems to relate, *inter alia*, to the following orders sought by the applicant, namely:

(a) to declare null and void the resolution of the general meeting of EON of 15 March 2010 with regards to the appointment of the 3rd to the 9th respondents as additional directors; and

(b) for damages in the sum of RM1,117,250,555 be paid to EON by the 1st to the 9th respondents.

With regards to this, the judicial commissioner ruled as follows:

> The appointment of the R3 to R9 as additional directors was an act of the shareholders and not of the Company to fall within the limb (b) of s. 181(1). Any allegation of 'fraud' by the majority on the minority, as argued by the Petitioner, is a matter *inter se* between shareholders and does not constitute an act of the Company.;

A The court however has no jurisdiction to award 'damages' or monetary compensation to a successful Petitioner. Damages may be ordered to be paid to the Company only as have been done in various cases, that is, if on evidence it is shown that there has been mismanagement or misconduct on the part of the directors and consequently the company has suffered a loss.

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Second Issue

[15] This issue relates to the subject matter of the four resolutions discussed earlier, which the applicant termed as an C "indirect takeover scheme" in the declaration it sought in prayer 1 of the petition which reads:

A declaration that the Indirect Takeover Scheme comprising the Proposed Resolutions are indivisible components of a scheme and its object is to rearrange or settle or has the effect of settling or D rearranging the existing mutual relationships between the Company (a going concern not in liquidation or in the process of liquidation) and its members and members *inter se* established under s. 33(1) of the Act, a matter which the Company as a creature of statute cannot lawfully achieve save by the Company making or E proposing with its members an arrangement under s. 176 of the Act which requires the assent of the Statutory Majority Requirement stipulated in sub-s. 176(3), or otherwise with the individual assent of each and every member of the Company at common law.

F **[16]** In his grounds of judgment, the judicial commissioner observed that premised on prayer 1 of the petition, the applicant "originally sought to impugn these proposals as being illegal alleging that such an arrangement or scheme could only be effected pursuant to a scheme under s. 176 of the Act" but in its G submission at the end of the trial, the applicant appeared to change its stance and had then argued that the transaction should be carried out as a voluntary winding-up or as an alternative, an arrangement or scheme under s. 176 of the Act. In relation to this the judicial commissioner said:

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In his closing or clarification submissions, Counsel for the Petitioner reduces his submission further to this, that is, if statutorily appointed ways to settle mutual relations (in the context of shareholders in a Company) are unworkable or impracticable, the Act provides a solution in s. 176 of the Act. This, in my

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view, can only mean that the Petitioner's position is no longer that a s. 176 scheme of arrangement is mandatory but merely an option open to the Company.

To be honest, I have found it difficult to string together the logic and reasoning of the Petitioner's arguments on this issue of the legality of the matters captured within the four Resolutions formulated by the current BOD for the approval of the shareholders.

[17] The judicial commissioner then held that the applicant's case on this point was "totally devoid of any merit" on the following grounds:

(a) there was no expropriation of property of the shareholders as canvassed in the arguments for the applicant; and

(b) "the matters contemplated within the four resolutions for approval by the shareholders did not run afoul of the law in any respects and were therefore valid for consideration by the shareholders."

Third Issue

[18] With regards to this issue, *viz*, the allegations of breach of statutory obligations and fiduciary duties by the board members of EON and that certain shareholders had disregarded or breached their obligation *qua* shareholder to the detriment of the interest of other shareholders, the applicant complained "that the powers of the directors and the shareholders were not exercised *'bona fide'* in the best interest of the company" but to promote, "sectional interest", namely, the express desire of certain major shareholders to exit EON. With regards to this averment, the judicial commissioner found "there is nothing on evidence that the shareholders here had any such 'sectional interest' as was alleged by the petitioner". He also made the following findings:

(a) the decision of the 10th, 11th and 12th respondents, which are locally incorporated companies and were shareholders, to exit EON had only to do with the realisation of value for their shareholding and for that matter, the 1st and 2nd respondents, who were representative directors of these shareholders, had no extraneous or collateral reasons to promote or achieve other then purely encash their shares and thus there was no 'sectional interest' that conflicted with the interest of EON;

(b) the 3rd to the 9th respondents were independent directors who held no share in EON, except for the 3rd respondent who had a nominal number of shares; and

(c) on the election of the 3rd to the 9th respondents as directors, the evidence showed that they were elected by an overwhelming majority of votes with the 3rd respondent obtaining in excess of 94% of the votes and the 4th to the 9th respondents with votes in the region of 60%.

[19] At the end of the day, in dismissing the petition with costs, the judicial commissioner held:

(a) "there was nothing 'illegal' about the takeover being in the form of an 'acquisition of assets and liabilities' and neither were the four resolutions in breach of any statute or of the company's powers";

(b) "the processes envisaged and the contents of the four resolutions did not violate the law or the constitutional provisions of the company; and

(c) "there was no shred of evidence at all of any personal benefit derived or of any such extraneous motives that could be attributed to the 1st to the 9th respondents to taint their decisions as not being taken honestly, in good faith and in the best interest of the company".

The Court Of Appeal

[20] The Court of Appeal found that the applicant has failed to bring its complaints within the ambit of s. 181 of the Act and hence dismissed the appeal with costs on the following grounds:

(a) that the judicial commissioner was correct in finding that the comprehensive proposal comprising the four resolutions was not an arrangement or any scheme within the meaning of s. 176(1) of the Act;

(b) there is no compulsion under the Act to go by way of s. 176(1) or by way of voluntary winding-up in order to effect the proposals comprising the four resolutions;

(c) s. 64 of the Act does not prohibit the reduction of capital to nil, provided that simultaneously a minimum of two shares are issued and that "it matters not whether the two shares are issued to parties who are not members prior to such reduction";

(d) that there is nothing illegal or unlawful in the proposals comprising the four resolutions tabled for the decision of the shareholders;

(e) "... we found that there is no evidence of conspiracy and or any deal between certain shareholders and Hong Leong Bank Bhd ...";

(f) "We are also of the view that the decision of the board of directors, in particular the 1st to the 9th respondents before the EGM, is not a visible departure from the standard of fair dealing and not a violation of the conditions of 'fair play' within the meaning of s. 181 of the Act as contended by the appellant at para. 14 of the Memorandum of Appeal"; and

(g) that the proposals comprising the four resolutions "have been approved by the relevant authorities, in particular the Securities Commission and Bank Negara Malaysia."

[21] With regards to the cross-appeal by the 3rd to the 9th respondents, the Court of Appeal held that it agreed with the judicial commissioner that the applicant has *locus* to present the petition and was entitled to raise complaints based on matters prior to the date it became a member of EON "so long as those matters continue to be relevant as at the date of filing of the petition".

The Application For Leave Before This Court

[22] The issues raised by learned counsel for the applicant in his outlined written submission came in the form of several questions which can be summarised as follows:

(a) An 'arrangement' under s. 176 of the Act means a settlement of mutual relations; if the proposal comprising the four resolutions is not an 'arrangement' within that meaning, what is it then? A reduction of capital *per se* or simpliciter under s. 64?

A (b) In the statutory governance of companies, the Act confers statutory power conferred upon a company to wind up itself voluntarily by special resolution. This is a prescribed statutory way to end, sever and settle mutual relations between a company and all its existing members. If liquidation is not
B preferred for the purpose of settling mutual relations with all members, the Act has specifically provided the mechanism of an arrangement to companies to achieve the same purpose without liquidation. If there is no need or compulsion under the Act for its statutory creature to go by either way, is s. 64
C another appointed statutory way to settle mutual relations between a company and all its existing members?

(c) Is it compatible with the scheme of the Act (particularly Part III Division 1 of the Act) and Parliament's intent to statutorily
D empower a company limited by shares to completely extinguish its existing shares and members under s. 64 by reduction of capital to permanently nil?

(d) Is it compatible with the scheme of the Act and is it within the 'corporate functions' of a company in s. 16(5), for a
E company to issue shares for the corporate purpose of winding up itself voluntarily?

[23] In opposing the application for leave to appeal, the common stand of counsel for the respective respondents is as follows:

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(a) the proposed appeal is academic, abstract and/or hypothetical and has no real prospect of success;

(b) that it is not a matter of public importance; and

G (c) that leave will not be given on abstract, academic or hypothetical questions of law (see *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51).

H **[24]** We would think that in giving due consideration to this application for leave to appeal, the following events that took place after the dismissal of the petition by the High Court on 28 April 2011 would be self-evident, namely:

I (a) On 6 May 2011, that is about eight days after the petition was dismissed, EON announced that the offer has been completed on that day whereby the sum of RM5,060,423,743.60 had been fully remitted to the company.

(b) On 25 May 2011, EON announced that it had presented a petition filed pursuant to s. 64 of the Act, ie, for reduction of share capital.

(c) On 27 May 2011, a share certificate was issued certifying that HLB was the registered shareholder of 1,329,807,163 shares in EON.

(d) On 1 July 2011, following an order of the High Court dated 17 June 2011, the whole of EON's business including its assets and liabilities were vested to HLB effective 1 July 2011. On the same day, EBB surrendered its banking licence to Bank Negara Malaysia.

(e) On 18 July 2011, the High Court allowed EON's capital reduction application.

(f) On 22 September 2011 EON held an EGM where the following resolution, *inter alia*, was passed, namely:

> THAT subject to the full completion of the capital repayment exercise as approved by the shareholders of the Company at the Extraordinary General Meeting held on 27 September 2010 ("Capital Repayment"), approval be and is hereby given to reduce the minimum number of Directors as provided for under Articles of Association of the Company from five (5) to two (2) ("Proposed Reduction of Directors").

[25] In relation to this, counsel for the respective respondents also pointed out that the following facts were not disputed:

(a) EON has since lodged with the Registry of Companies a copy of the court order dated 18 July 2011 confirming that its entire enlarged issued and paid-up share capital of RM 1,802,342,703.00 comprising 1,802,342,703 ordinary shares of RM1 existing immediately after the proposed capitalization be completely cancelled and that two new ordinary shares of RM1 each issued simultaneously with the said cancellation of its paid-up capital shall constitute its resulting altered paid-up capital upon the completion of the proposed capital reduction and repayment exercise.

(b) Pursuant to the capital reduction exercise and pursuant to s. 64 of the Act, EON has fully remitted the capital repayment to its entitled shareholders and having cancelled the entire enlarged issued and paid up share capital of RM1,802,342,703 comprising 1,802,342,703 ordinary shares of RM1 each and has issued two new shares at par.

(c) EON has been removed from the official list of Bursa Malaysia securities and has ceased all business and trading as a banking and financial institution since 27 September 2011. Consequently, all EON Bank's banking business has been re-branded as HLB.

The Transaction

[26] Going over the main points, what is clear is that the substratum of the proceedings in this action relates to a business transaction, namely, the sale of all the assets and liabilities of EON to HLB for cash and in consequence, a distribution of the monies to its shareholders.

[27] Sub-clause (18) of cl. 3 of the memorandum of association of EON clearly states that the company has the power to sell all its assets for cash; cl. 3 of the memorandum of association of EON, which states the objects for which the company was established, reads:

> (18) To sell the undertaking and all or any of the property of the Company for cash or for stock, shares or securities of any other company or for any other consideration.

[28] In the same vein, s.132C of the Act reads:

> (1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> (b) the disposal of a substantial portion of the company's undertaking or property,
>
> unless the arrangement or transaction has been approved by the company in a general meeting.

[29] The facts in this action showed that as a result of the 2nd revised offer, EON's board of directors resolved that an EGM of the company be held for its shareholders to consider the said offer. Thus the transaction was to be accomplished after getting approval from the company in a general meeting. The EGM was held on 27 September 2010 and the four resolutions discussed earlier relating to the transaction were passed at that EGM.

[30] The applicant wants to set aside this transaction by presenting this petition under s. 181 of the Act. In relation to this, learned counsel for the 1st, 10th and 11th respondents pointed out that "in essence, the methodology of the transaction has been challenged.

[31] The High Court dismissed the petition on the grounds that there was nothing illegal about the transaction and neither were the four resolutions in breach of any statute or the company's powers and this was affirmed by the Court of Appeal.

The Application For Leave To Appeal

[32] In its application for leave to appeal before this court, the applicant proposed six questions, referred to earlier, which it insisted would fall within the contemplation of s. 96(a) of the Courts of Judicature Act 1964. According to counsel for the applicant, these questions are novel issues. These questions, reproduced earlier, relate mainly to the interpretation of s. 33, s. 64 and s. 176 of the Act. We intend to deal with these questions as a whole as they clearly overlap.

Section 33

[33] Section 33(1) of the Act, which relates to the effect of the memorandum and articles of a company, reads:

> Subject to this Act the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

It is often said in textbooks that by virtue of s. 33 of the Act, the terms of the memorandum and articles of association are considered as the terms of a contract between the company and

its members. This would illustrate that where a member breaches the terms of the articles, the company may sue the member to enforce it and in the same way, where the company breaches the terms of the articles, the member may sue the company to enforce it. This would also denote that the articles only bind the company and the members in their capacity as members and not in any other capacity.

[34] In his outline written submission, counsel for the applicant pointed out that taking the transaction as a whole (he termed it as the "comprehensive proposal"), which would encompass the four resolutions and the reduction of share capital of the company to nil and the simultaneous issuance of two new shares, the "effect, intent and purpose" would be that it will "sever, end and settle in totality the mutual relations under s. 33(1) of the Act and its entire body of existing members with money derived from the sale".

[35] From our reading of this part of his written submission, we are of the view that counsel for the applicant seems to be implying that the "comprehensive proposal" runs afoul of s. 33 of the Act, that is, at the end of the day it would "sever, end and settle in totality the mutual relations" between EON and its members.

[36] We find it difficult to comprehend how s. 33 of the Act plays a part in the transaction. From our appreciation of s. 33 read together with s. 132C of the Act and also cl. 3(18) of the memorandum of association of EON, we cannot see how the transaction and the end result can be faulted by the applicant. The "comprehensive proposal" was approved by the company at the EGM, *viz*, the 2nd revised offer from HLB was approved by a majority of the shareholders. EON's circular to the shareholders relating to the EGM also clearly stated that upon the completion of the proposed capital repayment the company will no longer have any shareholders save for two individuals. This would denote that the company will be taking steps to reduce its share capital. It was also made known that the company may initiate a voluntary winding up thereafter.

[37] It is our view that there is nothing wrong or illegal for a company to undergo a capital reduction exercise under s. 64 of the Act after disposing of its entire business for cash and

consequently distributing the monies to its shareholders. That distribution of monies to the shareholders is a distribution of capital and hence there has to be a reduction of share capital exercise as the issued shares will then be unrepresented by assets, the entire business of the company having been disposed of (see s. 64(1)(b) of the Act). As such, we cannot see the relevance of s. 33 of the Act under these circumstances and neither can we see the necessity for counsel's contention that the transaction will "sever, end and settle in totality the mutual relations under s. 33(1) of the Act and its entire body of existing members with money derived from the sale". Would that not be the most logical or inevitable result after the reduction of share capital exercise?

[38] Further, the applicant has not shown that the "comprehensive proposal" unfairly discriminates against or is otherwise prejudicial to it as a member. Having failed to do so, the applicant cannot contend that it has brought itself within the scope of s. 181(1)(b) of the Act.

[39] The applicant, which had only one share registered in its name, ceased to be a member when its share was extinguished after the distribution of monies and the reduction of share capital exercise. There is nothing wrong or illegal with that ultimate result neither can the transaction be faulted. "Those who take interests in companies limited by shares have to accept majority rule" (per Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170). EON's principal asset is its 100% ownership of EBB and when EON disposed its entire assets and liabilities to HLB for cash, EON remains a company registered under the Act. If it has no other business, we cannot see why EON as a company cannot consequently undertake a voluntary winding-up exercise. If EON subsequently undertake a voluntary winding-up exercise, that would be of no relevance to these proceedings and is of no concern of the applicant as "mutual relations" between them would have ended.

[40] Pursuant to the capital reduction exercise, EON had fully remitted the capital repayment to its entitled shareholders including the applicant. After the capital reduction exercise, the entitled shareholders including the applicant would no longer remain on the register of members kept by the company pursuant to s. 158

of the Act. Whatever "mutual relations" there were no longer exist. There is no contravention of s. 33 of the Act and as such, we find no merit in this issue raised.

Section 176

[41] With regards to s. 176 of the Act, counsel for the applicant canvassed in his outline written submission as follows:

(a) that the Act has appointed only two statutory ways to settle mutual relations in totality, namely a voluntary winding up, under s. 254(1) or s. 270 or an arrangement under s. 176 without voluntary winding up which would require a "higher majority threshold than special resolution";

(b) that "in effect, a company not in liquidation wanting to settle its mutual relations in s. 33(1) has two options under the Act and the choice of one over the other makes the other statutory option mandatory";

(c) that the said proposals did not require or propose that the company in general meeting pass a voluntary winding up resolution to settle mutual relations under s. 33 and that "it is this non-requirement that makes compliance with s. 176 mandatory".

[Note: s. 254 of the Act deals with the circumstances in which a company may be wound up voluntarily and s. 270 deals with power of a liquidator to accept shares, etc., as consideration for sale of property of the company in a voluntary winding up]

[42] From what was canvassed above, it would seem to us that counsel for the applicant is contending that since the "comprehensive proposal" did not propose a voluntary winding up of EON to settle the "mutual relations", that would make it mandatory for EON to comply with s. 176 of the Act. We find it difficult to comprehend this contention. The relevant provisions of s. 176 of the Act reads:

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or

in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

...

(3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

...

(11) In this section:

"arrangement" includes a reorganization of the share capital of a company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods;

"company" means any corporation or society liable to be wound up under this Act.

[43] From our understanding, a scheme of arrangement falling within the contemplation of s. 176 of the Act is basically a scheme under which the rights of creditors and/or members are varied for the benefit of both the company and its creditors/members. The term "scheme of arrangement" is used where there is an internal arrangement within the company and does not involve any other company. The common use of such a scheme is the restructuring of the financial affairs of a company heavily burdened with debt. Section 176 is usually resorted to when the company is insolvent but there is some possibility of avoiding liquidation. Such a scheme may be able to save viable businesses resulting ultimately in a benefit to the creditors. Through such schemes, the company may be able to reach a compromise with creditors where the creditors agree to accept less than the amounts owed to them.

[44] Further, s. 176 allows a corporate restructuring to proceed under the court's supervision where the decisions of the majority creditors are binding on the minority creditors. The provision provides a mechanism to facilitate a formal compromise which binds dissenting participants so long as the agreement by statutory majority, defined as at least 75% in value and 50% in number of creditors, has been achieved, and subject to the approval of the court. This helps to overcome the impossibility or impracticability of obtaining unanimous consent of all the creditors to implement a debt-restructuring scheme. Thus, in cases where restructuring is not the desired objective, creditors can choose to wind up the distressed company.

[45] Counsel for the applicant contended that it is mandatory for EON to enter into a scheme of arrangement under s. 176 of the Act as the Act has appointed only two statutory ways to settle mutual relations in totality, namely, *vide* a voluntary winding-up or a scheme of arrangement. We have not come across any provision in the Act on this alleged mandatory requirement. The circumstances surrounding the transaction did not illustrate or suggest that creditors have come knocking on EON's doors which may necessitate EON to undergo a corporate restructuring exercise. Having regard to the aforesaid discussion, we find it difficult, if not impossible, to appreciate the matter from the perspective that counsel for the applicant had put forth. Counsel for the applicant put forth the question, namely, is the "comprehensive proposal" not an "arrangement" in law that attract s. 176 of the Act? Our answer to this would be in the negative under the circumstances surrounding the "comprehensive proposal". There is clearly no merit in this issue as raised.

Section 64

[46] With regards to s. 64 of the Act, counsel for the applicant submitted that the "comprehensive proposal" is self-explanatory, namely, it "sever, end and settle in totality the mutual relations under s. 33(1) of the Act between the company and its entire body of existing members with money derived from the sale ('Purpose')". He then put forth the following question, *viz.*, "Is s. 64 an appointed statutory way to achieve the 'Purpose'?". Counsel then answered the question by saying:

> Capital reduction (more accurately, complete extinguishment of members and capital in our case) is not an appointed statutory way to achieve the 'Purpose'.

We fail to comprehend this question which seems to us is premised on an hypothesis.

[47] Section 64(1) of the Act reads:

> Subject to confirmation by the Court a company may, if so authorized by its articles, by special resolution reduce its share capital in any way and in particular, without limiting the generality of the foregoing, may do all or any of the following:
>
> (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;
>
> (b) cancel any paid-up capital which is lost or unrepresented by available assets; or
>
> (c) pay off any paid-up share capital which is in excess of the needs of the company,
>
> and may so far as necessary alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

[48] In relation to this issue, counsel for the applicant submitted, *inter alia*, as follows:

> Section 64 is about maintenance of share capital, not extinguishment of the entire body of membership and capital. This is its true statutory purpose. It can only be used as a standalone if it is pure capital reduction to reflect the true financial position of the company or in reorganising capital represented by different types of shares and value per share. This case is not about capital reduction.

Once again, we find it difficult, if not impossible, to appreciate this contention from the perspective that counsel for the applicant had put forth. Section 64(1)(b) clearly provides that subject to confirmation by the court, a company may cancel any paid-up capital which is unrepresented by available assets. The facts surrounding the transaction speak for itself and as such we do not intend to delve further into this issue.

[49] On the whole, we are of the view that the six questions posed to this court are not questions of public importance. We would agree with the submission of counsel for the 3rd to the 9th respondents that the questions posed are academic and hypothetical. They are merely questions relating to the interpretation of s. 33, s. 176 and s. 64 of the Act and as such fail to meet the requirements for leave to appeal as summarised in *Terengganu Forest Products, supra*. In that case, Zaki Azmi CJ (as then was), followed the principles with regards to applications for leave to appeal to this court under s.96 of the Courts of Judicature Act 1964 as interpreted in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 CLJ 325; the learned CJ said (at p. 64):

> Leave will not be given on an abstract, academic or hypothetical question of law.

[50] The memorandum and articles of association of EON authorised the company "to sell the undertaking and all or any of the property of the company for cash". It also authorised the company to distribute, whether upon the winding-up of the company or otherwise, all or any of the assets and properties of the company among members in specie of kind or otherwise but that no distribution amounting to a reduction of capital can be made without the sanction of the court. In carrying out the transaction as a whole, EON had religiously adhered to the memorandum and articles of association of the company and the provisions of the Act most appropriate to the transaction and obtained the necessary court orders as required.

[51] The transaction was clearly not prohibited by law. We cannot see any merit in the applicant's insistence that the transaction should have been carried out as a voluntary winding up or as an alternative, under s. 176 of the Act. It is for EON to decide the appropriate method to effect the sale of assets and distribution of the proceeds to shareholders. We cannot find any provision in the Act which makes it mandatory for such a transaction to be completed under s. 176 of the Act. Further, we would say that s. 64 of the Act would be the most appropriate method to be used to cancel all existing share capital under the circumstances discussed earlier. The simultaneous issuance of two shares met the requirements of the Act and to us, is a non-issue.

[52] As discussed earlier, the transaction has since been completed. The matter is now academic. Mere use of voting power at a general meeting to secure the passing of resolutions would not in general constitute oppression for the purpose of s. 181(1)(a) or for any purpose under s. 181(1)(b) of the Act. It has been stressed in some textbooks that s. 181 is not intended to provide minority shareholders with a means of stultifying the voting power of the majority. "For a petition to succeed it must be shown that there has been oppression in a real sense of members *qua* shareholders, and not merely a subordination of their wishes to the power of the voting majority", per Romer LJ in *In Re HR Harmer Ltd* [1959] 1 WLR 62 at p. 67.

[53] What the judicial commissioner had to determine was whether the applicant has brought itself within the scope of s. 181(1) of the Act. He ruled that s. 181(1)(b) is sufficiently wide to allow the petitioner to ventilate his grievances. In other words, the applicant has to prove that the transaction including the four resolutions and reduction of share capital exercise "unfairly discriminates against or is otherwise prejudicial" to him as member. The judicial commissioner found no such evidence. This would be a finding of fact. In *Terengganu Forest Products* Zaki Azmi CJ said (at p. 65):

> There must be some finality in their decisions and these decisions are to be interfered only in instances where the trial courts have gone obviously wrong. On matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction is also often not interfered with by the appellate courts.

[54] The matter is now academic. The transaction has been completed. It has not been shown that the respondents had breached any provision under the Act or under the memorandum and articles of association of the company. The six questions posed by the applicant do not raise any matter of public importance. For the aforesaid reasons we dismiss this application with costs.

[55] After hearing counsel for the parties, we ordered that the applicant pay costs as follows:

(a) to the 1st, 10th and 11th respondents, the sum of RM50,000;

A (b) to the 3rd to the 9th respondents, the sum of RM50,000;

(c) to the 2nd and 12th respondents, the sum of RM30,000; and

(d) to the 13th respondent, the sum of RM10,000.

B We also ordered that the deposit be remitted to the respondents towards costs.

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